Before the
House Committee on Energy and Commerce
Subcommittee on Commerce, Trade, and Consumer Protection
Fair Use: Its Effects on Consumers and Industry
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Testimony of Gary J. Shapiro on behalf of the
Consumer Electronics Association
and the
Home Recording Rights Coalition

In Robert Bolt's extraordinary 1960 play, *A Man for All Seasons,* Sir Thomas More, Chancellor of England, is challenged by his son-in-law, Roper, for adhering to the law, rather than exercising his own authority:

Roper: So, now you give the Devil the benefit of law!

More: Yes! What would you do? Cut a great road through the law to get after the Devil?

Roper: I'd cut down every law in England to do that!

More: Oh? And when the last law was down, and the Devil turned 'round on you, where would you hide, Roper, the laws all being flat?

For consumers and for technologists, Mr. Chairman, fair use is one of the last laws standing today. Most of the rest have been flattened by congressional enactments, mandatory licenses, and court decisions that threaten to concentrate all copyright authority in the hands of a few large companies, in a few large industries. On behalf of the Consumer Electronics Association[1] and its more than 2,000 members, and the Home

[1] CEA is the principal trade association of the consumer electronics and information technology industries and the sponsor of the International Consumer Electronics Show. CEA represents more than 2,000 corporate members involved in the design, development, manufacturing, distribution and integration of audio, video, mobile electronics, wireless and landline communications, information technology, home networking, multimedia and accessory products, as well as related services that are sold through consumer channels. Combined, CEA's members account for more than $121 billion in annual sales. CEA's resources are available online at www.CE.org,

Recording Rights Coalition,[2] of which I am the chairman, I thank you, Chairman Stearns, Ranking Member Schakowsky, and the Subcommittee for holding this hearing on the importance of fair use to consumers and industry.

Consumer fair use was the key to allowing consumer video recorders onto the U.S. market in the 1970s and 1980s -- when members of the Motion Picture Association of America sought a *court injunction* against their sale to consumers. By a single vote, the Supreme Court held in 1984 that "time-shifting" of complete works, by consumers for private noncommercial purposes, was fair use, even though it occurred without the authorization, or even over the objection, of the copyright owner. The Supreme Court's decision in this year's *Grokster* case makes this holding all the more important, because the Court has now said that inventors and distributors of new technology can be found liable for copyright infringement based on"intent" to induce infringing uses. Sony, the Court says now, escaped liability for marketing the first VCR only because it was not clear at the time that it was unlawful for a consumer to make and keep a home recording, as Sony's advertising encouraged them to do. In other words: without fair use, we would have no VCRs and no audio tape recorders, and today, we would have no TiVos, no DVD recorders, no iPods, and no Slingboxes.

But the importance of fair use does not end with new products. Without it, I could not have shared with you the quotation with which I began my testimony -- despite the fact that Mr. Bolt's play is now 45 years old and that he himself died in England 10 years ago. Without fair use I could not have quickly found this information in the on-line *Wikipedia*, or retrieved it via *Google*. Without fair use I could not have quoted the lines

[2] The Home Recording Rights Coalition was founded in 1981 in response to legal and legislative threats to consumer enjoyment of new technologies. *See* www.HRRC.org.

of the play to CEA and HRRC members. Indeed, without fair use there would be very few web sites I could usefully visit, very few informative emails that I could send, and far fewer hardware and software products with which to learn and communicate.

The Nature of Fair Use

Unlike the judge-created legal theories of secondary copyright liability, under which inventors and manufacturers can be held liable for the actions of others, fair use protection is statutory. It resides in Section 107 of the Copyright Act, and represents the consolidation of hundreds of years of common law precedent in which courts protected against the abuse of copyright owners' monopoly power. It has origins in our First Amendment, because free expression includes the right to build on the ideas and accomplishments of others. More generally, it represents the balance between protection and innovation that can be traced back to the granting clauses of our Constitution itself, in which the rights to patent and copyright protection are created for a limited time, to promote the progress of science and the useful arts.

Fair use is a vital part of the bargain that our founders envisioned between artists and the public: artists get certain rights in the work they create; the public gets to use those works in fair and reasonable ways. Three years ago in *Eldred v. Ashcroft*, the Supreme Court said that fair use is not a triviality – it is one of the key provisions that keeps copyright law in harmony with the First Amendment. Fair use, the Court said, was a major reason why Congress had the discretion to extend the term of copyrights – because users' rights and autonomy were preserved by fair use.[3]

[3] CEA and HRRC believe nevertheless that this discretion was exercised unwisely in this instance.

The concept of fair use is almost uniquely American. In most other societies, unauthorized uses must be the subject of enumerated exceptions to the copyright laws. In a rapidly changing technological and consumer environment, this is far from ideal. The truly innovative, popular new products, things like digital video recorders and iPods, allow consumers to enjoy copyrighted works in ways that no one had anticipated. No legislature could hope to lay out specific copyright exemptions for products like those before they are invented, and without an exemption, even investing in the development of a new product becomes far too risky. I think it is fair to say that American technological leadership – particularly in the age of the Internet – has relied largely on the assurance that our fair use doctrine has given to innovators and venture capitalists. But this may be changing.

The Importance of Fair Use

Until the Supreme Court's *Grokster* decision this year, most innovators and venture capitalists had a concise view of the law as a "bright line" test, based on language in the 1984 *Betamax* decision: If a new product has or is capable of substantial non-infringing uses, it is lawful to put it on the market. In this construct, a product designer or manufacturer understood that any product that had or was likely to have substantial fair uses was lawful. The *Grokster* opinion, however, seems to have turned this formulation on its head: Whether an intention to "induce" a copyright violation is found may now depend on whether *any* uses of the product, if they are urged and enabled by the manufacturer, investor, or distributor, are deemed *unlawful* as a matter of copyright law.

The idea that product innovators, investors, and consumers should have to live in a world of *only* those uses authorized, in advance, by copyright proprietors, was exactly

what the Supreme Court in the *Betamax* case said it wished to avoid. Such a regime would subjugate the intellectual property rights of ***patent owners***, granted in recognition of their promotion of new technology, to the more easily obtained rights of ***copyright proprietors***. The *Betamax* Court said that such a result would "choke the wheels of commerce." In *Grokster*, the Court did not say that any such result would be preferable or justified. The Court pointed out that even though Sony's advertising for the Betamax VCR promoted uses such as the "librarying" of programs, such consumer conduct was not "necessarily unlawful."

This is the essence of fair use -- giving consumers, innovators, and manufacturers the benefit of the doubt that the private, reasonable activity of consumers, and the productive activity of those inspired by copyrighted works is not "necessarily unlawful." Now that the Supreme Court, in order to get at some "purposeful, culpable" practices of free file sharing services, has cut down the other legal protections that technologists thought they enjoyed, fair use is *all* that stands between inventors, investors, and consumers and a world in which all new products must be fully authorized, in advance, by any owner or distributor of any copyrighted material that a new device is able to store, reproduce, communicate or perform.

The Threat To Fair Use

Even before the *Grokster* case, some major motion picture studios were unwilling to accept the notion that the modern successors to the VCR could be marketed on an unauthorized basis. A competitor to TiVo was sued into bankruptcy in a case in which a complaint by three major studios attacked the basic recording, indexing, and playback features of a consumer home recorder. An entire chapter of the complaint brought by

MGM, Orion Pictures, Fox Film Corporation, Universal City Studios Productions, and Fox Broadcasting specifically attacks standard features, found on any PVR product, as "inducements" to copyright violation:

> "Defendants cause, accomplish, facilitate and induce the unauthorized reproduction of Plaintiffs' copyrighted works in violation of law. *** The ReplayTV 4000 device provides expanded storage, up to (currently) a massive *320 hour* hard drive, which allows the unlawful copying and storage of a vast library of material. *** ReplayTV 4000's expanded storage and sorting features organize disparate recordings into coherent collections, and cause, facilitate, induce and encourage the storage or "librarying" of digital copies of the copyrighted material, which harms the sale of DVDs, videocassettes and other copies, usurps Plaintiffs' right to determine the degree of 'air time' a particular program receives in various cycles of the program's distribution ...."[4]

This year, elements of the recording industry have threatened suit against innovative new, portable products that have been announced for the Sirius and XM satellite radio services – *despite* the fact that these products fall squarely under the protection of the Audio Home Recording Act, under which royalties are paid to the music industry and there is an express immunity from copyright suit. The Recording Industry Association also is seeking legislation to empower the Federal Communications Commission to "lock down" the functions of consumer radio receivers for the new Digital Audio Broadcasting service. Forty-three years since the first audio cassette recorder came to the U.S. market, the recording industry still wants to deny consumers the ability to record radio programs in the privacy of their homes. In fact, just two weeks ago during an appearance down the hall from this hearing room, the head of the RIAA complained that "the one-way method of communication [enabled by HD radio] allows

[4] *Metro-Goldwyn-Mayer Studios, Inc. et al v. ReplayTV, Inc.*, U.S. District Court, Central District of California, Case No. 01-09801, Complaint of MGM, Orion Pictures, Twentieth Century Fox, Universal City Studios, and Fox Broadcasting, ¶¶ 24-25, November 14, 2001 (emphasis in original). Pleadings in this case can be found at http://www.eff.org/IP/Video/Paramount_v_ReplayTV/.

individuals to boldly engage in piracy with little fear of prosecution." In other words, the RIAA believes that when you, your staff, and your constituents tape a song off the radio, you have engaged in piracy and ought to be criminally prosecuted.

The campaign for copyright absolutism has not stopped with attacks on consumer devices and long-standing consumer practices. Just this year, major publishing groups filed suit against Google, which has been working with major university libraries, and others, to digitize libraries as a tool in aid of research and education. Google will not make entire works available without authorization, and will withdraw from the program any work as to which the copyright owner objects, these publishers, apparently, pursue this case only in the name of absolute control over use – a direct affront to the fair use doctrine.

The Encroachment Of Other Laws

In 1998 the Congress passed the Digital Millennium Copyright Act (the "DMCA"), which prohibits "circumvention" of technical measures used in aid of copyright protection. While this legislation made a bow toward the fair use doctrine, it did not clearly or explicitly provide that legality of the intended use under copyright law was a defense to violation of the DMCA.

So, for example, a use that courts and commentators universally agree is fair – such as time-shifting a TV program to watch later – can be effectively made illegal by adding a technical lock to prevent that use. Time-shifting is legal, but if a consumer would have to violate the DMCA in order to exercise his or her right to do it, then the right becomes meaningless. As presently written, the DMCA therefore allows a single company to violate the balance of fair and unfair uses that the courts have developed over

the past century. This consequence, perhaps unintended, has caused concern and uncertainty among consumers, small businesses, educators, librarians, and others. As you know, Chairman Barton and Representatives Boucher and Doolittle have introduced H.R. 1201 to clarify the impact of the DMCA on the fair use doctrine, and to codify the elements of the *Betamax* case that were preserved by the Supreme Court in *Grokster* and – most presciently – to require that consumers be warned against Compact Discs to which copy protection technology has been applied. CEA and the HRRC have endorsed H.R. 1201 as a sensible way to preserve consumers' autonomy and protect innovators in the 21st century.

Fair Use and Personal Autonomy

Americans believe they should be able to use the things they buy in whatever way they choose, as long as their use doesn't injure others. We tinker with our cars. We put radios in the shower. We look for new ways to experience the content that we buy, the Internet that we use, and the new versions that we can create. The autonomy and the freedom to use what we buy is something we take for granted.

For digital products like music, movies, and software, fair use is what gives us that freedom and autonomy, because every use of a digital product creates an incidental copy. Limiting fair use opens the door to copyright owners to enter our sphere of personal autonomy, and dictate how we can use the products that we buy within our own homes and vehicles.

Americans who believe in speed limits still won't buy a car that's electronically blocked from going over 70 miles per hour. We trust people to use their cars responsibly; legal enforcement kicks in only when they don't. For music, movies, the Internet, and

the digital products we use every day, fair use is what gives us that trust and autonomy, within our personal sphere, and saves legal enforcement for those who, as the Supreme Court said in *Grokster,* engage in clearly culpable conduct.

Fair Use And Creativity

The last few years have seen the rebirth of the feature-length documentary as a popular and socially valuable art form. Yet, denying that fair use applies, copyright owners have demanded stiff royalties from documentary producers for every billboard, every whistled tune, and every cellphone ring that appears in their portrayals of real everyday life. Jonathan Caouette's acclaimed documentary *Tarnation*, which showed at the Cannes and Sundance film festivals this year, cost $218 to produce but required tens of thousands in licensing fees for incidental appearances of copyrighted material. Fair use, as it exists today, can and should help filmmakers like Jonathan Caouette get a fair deal. All that's missing is that these filmmakers know their rights and are not bullied into giving them up.

Even if one will never become a film producer or a songwriter, the First Amendment protects our rights to *receive* expression, as well as to *send* it. A fully informed citizenry is at the core of our democracy. We cannot afford to have our information and, indeed, our own history, managed by corporations on a 100 percent authorized basis any more than we can afford to have our technology and innovation managed that way.

Fair Use Is A Check On Monopoly Power

Given the relatively small number of mass media companies, and their size, it is daunting enough for a single corporation to control, in seeming perpetuity, a large portion of our cultural and historical heritage. It is even more daunting when these corporations band together as industry groups, and insist on the right to prescribe how their content will be enjoyed, *and* the technologies that can and cannot be used whenever any of their collective content is involved. We do not believe that either the Congress or the Supreme Court has envisioned them enjoying such power, but already they do.

Already, content providers and distributors have been moving to announce *in advance* that they will "license" only technologies and techniques that are satisfactory to them, and will not license, or will challenge, others. Already, the ability of competitive manufacturers to benefit from a 1996 Telecommunications Act provision that Rep. Markey and former Chairman Bliley introduced, to assure that competitive products can work directly on digital cable and satellite systems, has been slowed by the centralized control over product licensing by a technology consortium owned by the cable industry, "CableLabs."[5]

In September, the motion picture industry announced that is forming a similar central laboratory, reporting directly to the CEOs of the major motion picture companies: ***"MovieLabs."*** The purpose of MovieLabs, according to statements attributed to a senior studio executive, is to fill "gaps in research on content protection left by consumer electronics companies and Silicon Valley."[6] In reality, though, the market for such new

[5] The legal rationale for such control is grounded in the copyright concerns of content providers.
[6] *See*, http://www.nytimes.com/2005/09/19/business/19film.html?ex=1127793600&en=fb357f94a7634723&ei=5070&emc=eta1

"DRM" technologies has been highly competitive and more than robust. Something more seems to be going on.

Thus far, DRM technologies have been licensed by the technology companies that develop them. Often, these companies are *also* developers of consumer products, and are reluctant to impose limitations on the usefulness of these products to consumers. Therefore they have negotiated with content providers about the nature and level of "protections" to be applied. In resisting the power of movie and cable monopolists who have complete control over product distribution, their only argument has been based on *fair use* – not necessarily as a consumer right to engage in specific practices, but as a *public policy expectation*, deeply engrained in our law and jurisprudence, that consumers and technologists must be afforded space and freedom consonant with their roles in our society.

These negotiations have escalated to congressional and regulatory proceedings. The only technology mandate in the DMCA, Section 1201(k), requires that certain analog VCRs to respond to Macrovision copy protection technology. It is, however, limited by "encoding rules" that strictly govern when this technology can and cannot be triggered. Similarly, the FCC's "Plug & Play" regulations for "Digital Cable Ready" devices acknowledge that an industry-wide license for products to attach to digital cable systems requires the mandatory application of certain copy protection technologies, *but also* strictly limits the circumstances in which these technologies can be triggered.

These "encoding rules" do not state or approximate judicial outcomes; they are, rather, a set of expectations based on public policy. They are enormously difficult to negotiate and maintain in the face of the demands of copyright proprietors to control and

specifically authorize every conceivable use of their products. In the case of the FCC regulations, the outcomes are open to review by the Commission whenever there is a new service, or a petition for a rule change. And the music industry – which negotiated the very first set of encoding rules with us and the Congress as part of the Audio Home Recording Act of 1992 – is now trying to ignore the very AHRA rules it agreed to. It is asking the Congress for different and harsher impositions in new legislation, governing satellite and terrestrial broadcasts, that the industry has proposed to the House Judiciary Committee.

It is only through the vitality of the fair use doctrine as a *political* expression of public policy that the concerted might and licensing pressure of the industries that sell and distribute content can be brought into some balance. This involves, of course, maintaining the vitality of Section 107 in the courts. It also requires, however, that the Congress maintain a legislative and policy balance with fair use in mind –

- That the Congress not conflate instances of mass, indiscriminate and anonymous redistribution of works over the Internet with the right of individuals and family groups to enjoy content in a modern and flexible home or family network that may embrace households in different regions.

- That the Congress should not allow the technical tools to create and maintain such home networks to fall under the exclusive control of those who sell or distribute content, solely by virtue of their effective or concerted *copyright* monopolies.

This Committee has played a key role in preventing or limiting such abuses. By holding today's hearing on the fair use doctrine, your Committee and this Subcommittee continue their leadership in protecting the American public, American innovation, and American culture. On behalf of CEA and the Home Recording Rights Coalition, I again thank you for holding this hearing, and pledge our continued cooperation with you and your staffs.